DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
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DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. POPEYE'S/FARIS ENTERPRISES Respondent	Case Nos.: I-00-70252 I-00-70275

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985 (D.C. Code §§ 6-2701, *et seq.*) and Title 23, Chapter 30 of the District of Columbia Municipal Regulations ("DCMR"). By Notice of Infraction (No. 00-70252) served December 21, 2000, the Government charged Respondent Faris Enterprises (trading as Popeye's Chicken & Biscuits) with a violation of 23 DCMR 3012.1 for failing to take all necessary precautions to keep the premises free from rats and vermin.[1] The Notice of Infraction alleges that the violation occurred on December 12, 2000 at 2001 Georgia Avenue, N.W., and seeks a $1,000.00 fine.

[1] 23 DCMR 3012.1 provides: "All persons engaged in the operation of any restaurant, delicatessen, or catering business shall be required to take all necessary precautions to keep the premises free from rats and vermin."

Because Respondent failed to answer the Notice of Infraction within the allotted twenty (20) days (fifteen (15) days plus five (5) days for mailing pursuant to D.C. Code §§ 6-2712(e), 6-2715), this administrative court issued a notice of default on January 23, 2001. The notice assessed Respondent a penalty of $1,000.00 pursuant to D.C. Code § 6-2704(a)(2)(A) for failing to timely answer the Notice of Infraction, and required the Government to serve a second Notice of Infraction. The Government served the second Notice of Infraction (No. 00-70275) on February 5, 2001.

On February 14, 2001, this administrative court received Respondent's plea of Deny to the second Notice of Infraction (No. 00-70275), along with a letter asserting that Respondent, through its president, Farid Naimi, had mailed in its plea to the first Notice of Infraction (No. 00-70252) on December 27, 2000. By order dated March 2, 2001, this administrative court scheduled an evidentiary hearing for April 4, 2001.

The hearing took place as scheduled on April 4, 2001. Maria Hille, the charging inspector in the case, appeared on behalf of the Government. Farid Naimi appeared *pro se* on behalf of Respondent. Petitioner's Exhibits 101, 102, 103 and 104 ("PX-101, PX-102, PX-103 and PX-104") were admitted into evidence.[2] Respondent did not offer any documents into evidence at the hearing, but subsequently offered into evidence a Domestic Return Receipt card

[2] At the hearing, the Government had not submitted a complete copy of PX-101, and, prior to ruling on its admissibility, I requested a complete copy to be filed and served no later than April 13, 2001. Respondent did not object to the admission of PX-101 as incomplete, although Respondent noted some disagreement with the factual content of that exhibit. The Government filed and served a complete copy of PX-101 on April 5, 2001, and, in my order of April 26, 2001, I admitted PX-101 into evidence.

dated February 14, 2001 indicating service to this administrative court of Respondent's answer to the second Notice of Infraction (No. 00-70275). *See* Respondent's Exhibit 200 ("RX-200").

II. Application of Respondent's Affirmative Defense to these Proceedings

During the course of the hearing, Respondent raised what this administrative court construed to be an affirmative defense of unlawful selective prosecution on the part of the Government. Respondent based its defense on the assertion that, as compared to other establishments in the area, its establishment has been constantly "harassed" by Government inspectors for the year prior to the service of the first Notice of Infraction (No. 00-70252) on December 21, 2000. Mr. Naimi testified that he believed that this alleged harassment was in part the result of an altercation he had had with a Government inspector/supervisor sometime in early 2000 regarding the signing of an unidentified paper relating to his establishment.[3]

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[3] In general, a successful affirmative defense of unlawfully discriminatory selective prosecution will result in the dismissal of the Government's charge. *See United States v. Vazquez*, 145 F.3d 74, 82 n.6 (2d Cir. 1998). While legally valid, an affirmative defense of unlawful selective prosecution is rarely successful. This is because courts examining such claims have made clear that selective prosecution for most reasons, even reasons that seem at first blush to be unfair or biased, is nonetheless legal. *See, e.g., United States v. Quinn*, 123 F.3d 1415, 1426 (9th Cir. 1997) (no selective prosecution defense where government's policy of not prosecuting federal drug crimes involving 50 grams of crack cocaine resulted in no federal charges against Caucasians); *Pincolotti v. Reno*, No. C-95-2143, 1996 U.S. Dist. LEXIS 4840, at *18 (N.D. Cal. Mar. 12, 1996) (no selective prosecution defense where INS's concentrated prosecution of aliens was apparently based on geographical location); *see also Falls v. Dyer*, 875 F.2d 146, 148 (7th Cir. 1989) (noting, "[s]electivity is not the same as applying the law to one person alone. A government legitimately could enforce its law against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance. The prosecutor may conserve resources for more important cases."). In summary, only when a proponent of such a claim satisfies the "demanding" burden of proving that a prosecution unjustifiably "had a discriminatory effect and . . . was motivated by a discriminatory purpose" will a court question the exercise of the government's broad discretion and power to prosecute. *United States v. Armstrong*, 517 U.S. 456, 463-64 (1996); *see also Robinson v. United States*, Nos. 98-CM-106 and 98-CO-694, 2001 D.C. App. LEXIS 64, at *28 (D.C. Mar. 15, 2001).

In response to Respondent's raising this difficult to establish, but nonetheless legally valid affirmative defense, I ordered the charging inspector to provide by April 13, 2001 a log of the Government's official visits to Respondent's establishment located at 2001 Georgia Avenue N.W. from the period January 1, 2000 through December 31, 2000. This order was issued after I questioned the charging inspector about Respondent's initial showing regarding the alleged unlawful selective prosecution, and she could offer no personal knowledge, other than with respect to her own inspection on December 12, 2000, in response with which to rebut orally Respondent's claims during the hearing. In addition, I permitted Respondent to submit by April 13, 2001, any evidence to support its assertion that it timely submitted its answer to the first Notice of Infraction (No. 00-70252).

On May 7, 2001, the Government, through counsel, objected to producing the documents at issue, and offered a brief in support of its position. The Government argued the production of these documents would be both unduly burdensome and irrelevant, and that the Government's prosecution of this case is a product of a legitimate fulfillment of the Bureau of Food, Drug and Radiation Protection's "mandate" to enforce 23 DCMR 3012.1. The Government also argued that, in light of the documentary evidence and testimony presented at the hearing, it has met its burden of proof of Respondent's violation of 23 DCMR 3012.1, and that Respondent has failed to provide sufficient allegations to establish the selective prosecution affirmative defense. Finally the Government requested that I decide the matter on the record established.

By Order date May 16, 2001, I permitted the Respondent to respond to the Government's May 7, 2001 submission. On May 25, 2001, this administrative court received Respondent's submission containing a conclusory statement that the documents at issue are relevant because "it revels [sic] that harassment of my establishment did accrue . . . ." Respondent also requested that I dismiss any proposed fine "on the bases of anger, hostility of a government employee." Respondent's response was wholly lacking in substance and failed to address the substantive bases for the Government's irrelevance and undue burden objections. Moreover, Respondent did not provide any additional evidence beyond its conclusory assertion, now rebutted by the Government's submission, that might tend to establish an affirmative defense of unlawful selective prosecution.

Based on this record, therefore, I conclude that Respondent's affirmative defense claim of unlawful selective prosecution must fail because it has failed to come forward with evidence to satisfy the legally mandated requirement of proving that the Government's inspection(s) of Respondent's establishment had a discriminatory effect and was motivated by a discriminatory purpose. *See Armstrong*, 517 U.S. at 463-64; *Robinson*, 2001 D.C. App. LEXIS 64, at*28.

III. Findings of Fact

Based upon the testimony of all the witnesses, my evaluation of their credibility, the documents admitted into evidence, and the entire record in this matter, I now make the following findings of fact:

1. Farid Naimi is the president of Respondent Faris Enterprises, Inc. which is trading as Popeye's Chicken & Biscuits. PX-105.

2. Based on an anonymous complaint about the presence of rodents at Respondent's business at 2001 Georgia Avenue, N.W., on December 12, 2000 at approximately 12:30 P.M., Maria Hille, a sanitarian employed by the Department of Health's Bureau of Food, Drug and Radiation Protection, inspected Respondent's establishment at 2001 Georgia Avenue, N.W. PX-101.

3. During the course of the inspection, Ms. Hille observed, among other things: rat droppings in the back room/food preparation area in the corners and under certain equipment; rat droppings on a platform under a chemicals rack; wall openings next to Respondent's ice making machine; food debris inside a piece of food processing equipment; and food debris and rat droppings under Respondent's front service counter. PX-101; PX-102; PX-104. Ms. Hille also smelled the scent of what she believed to be urine under the front counter area. In the basement of the building, Ms. Hille observed large openings by what appeared to be a window toward the rear of the building, the presence of dirt, evidence of pooling water and rat droppings. Ms. Hille observed, however, that the trash area behind Respondent's establishment was well kept.

4. During her inspection, Ms. Hille observed no rodent traps or other evidence of on-going extermination efforts at Respondent's establishment.

5. In light of her findings, Ms. Hille called her supervisor Alma Alston to the site, and a summary suspension was subsequently issued. PX-101. The summary suspension closed Respondent's establishment for approximately three days.

6. Respondent's establishment had been receiving monthly pest control services from EnTech Pest Elimination ("EnTech") since July 1998. PX-103. EnTech conducted an inspection of Respondent's establishment on December 12, 2000, and placed rodent extermination materials inside and outside the establishment. Additional extermination services were scheduled for December 18, 2000, December 27, 2000 and January 8, 2001. PX-103; PX-104.

7. On December 15, 2000, Respondent set out a plan of action for "cleaning and rodent control." PX-104.

8. The Government served the first Notice of Infraction (No. 00-70252) on December 21, 2000. Respondent testified that it submitted its plea to the first Notice of Infraction (No. 00-70252) to this administrative court by regular mail on or about December 27, 2000. Respondent is not certain of the date of its mailing, and bases the December 27, 2000 date on the date of its receipt of the first Notice of Infraction (No. 00-70252) and its usual, 24-48 hour turn-around time for business correspondence. This administrative court never received Respondent's plea to the first Notice of Infraction (No.00-70252).

9. Respondent timely responded to the second Notice of Infraction (No. 00-70275). RX-200.

10. Respondent has not raised any claim of defective service by the Government or this administrative court in this case.

11. There is no evidence in the record of a history of non-compliance by Respondent.

12. Respondent asserts that it is not responsible for any alleged rodent problem at its establishment due to the general rodent control problem in the District of Columbia.

IV. Conclusions of Law

1. Respondent violated 23 DCMR 3012.1 on December 12, 2001 at its establishment located at 2001 Georgia Avenue, N.W. *See* PX-101; PX-102. A fine in the amount of $1,000.00 is authorized for this violation. *See* 16 DCMR 3216.1(i).

2. Respondent has requested a reduction or suspension of the imposed fine. Respondent took steps both prior to and after the December 12, 2000 inspection to control pests at the premises. PX-103. Given the condition of Respondent's establishment at the time of the violation as reflected in the Government's photographs, however, it is evident that Respondent's pre-December 12, 2000 pest control efforts were inadequate. PX-102. In light of the lack of any evidence from the Government indicating that Respondent has had compliance problems in the past, I conclude that a reduction, although not a suspension, of the fine is appropriate in this case. Accordingly, the fine will be reduced to $825.00. *See* D.C. Code § 6-2703(b)(6).

3. As to the penalty, pursuant to D.C. Code § 6-2712, if a respondent has been duly served a Notice of Infraction and fails, without good cause, to answer that Notice

of Infraction within the established time limits, the respondent shall be liable for a penalty equal to the applicable fine. D.C. Code § 6-2704(a)(2)(A).

4. In this case, Respondent has testified that, based on its usual 24-48 hour response-time standard, it mailed its plea to the first Notice of Infraction (No. 00-70252) to this administrative court (which was due to be filed no later than January 10, 2001) on or around December 27, 2000, although it is uncertain of the precise date. This administrative court never received Respondent's submission.

5. Respondent has not claimed any of the documents served upon it were not received, or that service by the Government or this administrative court was somehow defective. I find it noteworthy, therefore, that Respondent waited until February 14, 2001 to first advise this administrative court that it had already submitted its plea to the first Notice of Infraction – well after this administrative court's January 24, 2001 service of the Notice of Default, and after the Government's February 5, 2001 service of the second Notice of Infraction (No. 00-70275).

6. Respondent was on notice upon its receipt of the January 24, 2001 Notice of Default that this administrative court had not received its answer. Respondent's delay in advising this administrative court that it had in fact timely answered the first Notice of Infraction (No. 00-70252) appears at odds with its stated "usual" practice of responding to notices affecting its business within 24-48 hours. Moreover, Respondent's February 14, 2001 answer to the second Notice of Infraction (No. 00-70275) served February 5, 2001, while timely, also does not appear to support the 24-48 hour response time attested to by Respondent.

Accordingly, I conclude that Respondent's statement of its usual practice, its uncertainty about the exact date of mailing, and its delay of several weeks before coming forward with an explanation of its failure to file an answer to the first Notice of Infraction (No. 00-70252) all undermine its assertion of good cause in this case. Accordingly, Respondent has failed to demonstrate good cause for failing to timely respond to the first Notice of Infraction (No. 00-70252), and is liable for a penalty in the amount of $1,000.00. D.C. Code § 6-2704(a)(2)(A).

V. Order

It is, therefore, upon the entire record in this matter, this _____ day of _____, 2001:

ORDERED, that Respondent shall pay a total of **ONE THOUSAND EIGHT HUNDRED TWENTY-FIVE DOLLARS ($1,825.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715); and it is further

ORDERED, that, if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance

Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Code § 6-2713(f), the placement of a lien on real and personal property owned by Respondent pursuant to D.C. Code § 6-2713(i), and the sealing of Respondent's business premises or work sites pursuant to D.C. Code § 6-2703(b)(6).

/s/ 8/8/01

Mark D. Poindexter
Administrative Judge